

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MICHAEL C. McCORMICK

Claimant,

vs.

BEN E. KEITH FOOD SERVICE

Respondent,

CS-00-0010-276

AP-00-0448-112

and

TRAVELERS INDEMNITY CO. OF CONNECTICUT

Insurance Carrier.

ORDER

Respondent requested review of the December 3, 2019, Award issued by Administrative Law Judge (ALJ) Thomas Klein.

APPEARANCES

Patrick J. Mitchell appeared for Claimant. William L. Townsley, III, appeared for Respondent and Insurance Carrier.

RECORD AND STIPULATIONS

The Board considered the record and adopted the stipulations listed in the Award. The Board also received into evidence a copy of the written fee agreement between Claimant and his attorney by agreement of the parties. The Board reviewed the parties' briefs and heard oral argument on June 25, 2020.

ISSUES

1. Did Claimant sustain personal injury from an accident arising out of and in the course of his employment with Respondent? In particular, was the alleged accident the prevailing factor causing Claimant's alleged injuries, need for treatment, and the resulting disability or impairment?
2. What is the nature and extent of Claimant's resulting disability?
3. Did Claimant meet his burden of proving entitlement to an award of future medical treatment?

FINDINGS OF FACT

Claimant worked for Respondent as a truck driver hauling double trailers. Claimant connected the trailers to his tractor as part of his work. Claimant used a converter dolly weighing approximately 3000 pounds to move the trailers. Claimant was employed by Respondent for eleven years. Claimant was fifty-six years of age at the regular hearing. Claimant graduated from high school and has some college credits with no certificates or degrees. Claimant's medical history is notable for a prior low back strain from a work-related accident in 2008 requiring two weeks of conservative treatment. Claimant returned to his regular work without restriction, and Claimant was not rated. Claimant also sustained a left knee injury in 2011. Claimant takes prescription medication twice a day for chronic knee pain.

On July 3, 2014, Claimant was using a truck to move a trailer, which required Claimant to push and rotate his body. Claimant felt pain in his back. The following day, Claimant felt severe low back pain and was unable to get out of bed. Claimant reported the incident at work and his symptoms to his supervisors, and Claimant was referred to Dr. Dobyns for medical treatment.

Claimant received conservative treatment at Via Christi Occupational Medicine. Claimant was initially diagnosed with an aggravation of a degenerative condition for which Claimant was declared at maximum medical improvement. An MRI was administered on July 23, 2014, and was interpreted as showing a herniated disc at L4-5, and Claimant received conservative treatment from Dr. Dobyns. Claimant's symptoms did not improve, and Dr. Dobyns referred Claimant to Dr. Henry for a neurosurgical consult.

Dr. Henry evaluated Claimant on September 23, 2014. Dr. Henry reviewed Claimant's history of the work-related accident and course of treatment. The MRI scan was interpreted as showing spondylolisthesis at L4-5 and L5-S1, severe arthritis, and severe stenosis at L4-5 causing nerve elements to be pinched. Claimant was diagnosed with a herniated disc at L4-5. Dr. Henry recommended surgery, but did not believe the work-related accident was the prevailing factor causing the herniated disc or need for surgery. Dr. Henry believed the work-related accident could have caused soft-tissue injuries to the low back. Claimant told Dr. Henry he was not interested in undergoing surgery and Claimant was referred to Dr. Dobyns for additional conservative treatment.

Dr. Murati evaluated Claimant on October 15, 2014, and noted complaints of low back pain with radiculopathy down both buttocks and legs. A history of a prior mid-back strain was noted. Dr. Murati noted decreased sensation on the right side and decreased strength on the left side. Dr. Murati reviewed MRI and CT scans. Dr. Murati diagnosed low back pain with radiculopathy and spondylolisthesis caused by the work-related accident. Dr. Murati recommended additional medical treatment for Claimant's work-related injuries.

Claimant sought additional medical treatment based on Dr. Murati's report and a preliminary hearing was held on December 23, 2014. Dr. Prostic was appointed to perform a Court-ordered independent medical examination. Dr. Prostic performed the examination on February 23, 2015. Dr. Prostic reviewed the history of the work-related accident, Claimant's prior low back strain and Claimant's course of treatment with Drs. Dobyns and Henry. Dr. Prostic noted pain at the center of the waist with intermittent pain running down both thighs to both feet. CDs of the prior radiologic studies were reviewed. Dr. Prostic diagnosed an annular tear at L5-S1 with radiculopathy and stenosis, and recommended additional medical treatment. Dr. Prostic thought work activities were the prevailing factor causing Claimant's medical condition and need for medical treatment. Dr. Henry was authorized to provide additional medical treatment.

On August 7, 2015, Dr. Henry performed a laminectomy at L4-5. Claimant's post-operative recovery was notable for lack of sensation, and a spinal fluid leak was identified at the surgical site. Claimant underwent a surgical repair of a pinhole leak at the surgical site. Claimant remained symptomatic following his post-operative recovery. Dr. Henry recommended a fusion at L4-5.

On January 5, 2016, Claimant underwent an examination by Dr. Bailey at the request of Respondent, and Dr. Bailey issued a report dated April 6, 2016. Dr. Bailey noted Claimant smoked. Dr. Bailey also noted pre-operative studies of an unknown date revealed spondylolisthesis, pars interarticularis defects, degenerative disc disease and L4-5 stenosis, which all preexisted the work-related accident. Dr. Bailey noted Claimant had increased symptoms following the work-related accident, but Claimant's need for surgery was due to the preexisting condition and not due to the work-related accident. Dr. Bailey also stated smoking interfered with the fusion process. Following a preliminary hearing on April 12, 2016, on the authorization of the fusion recommended by Dr. Henry, ALJ Klein issued an order reiterating Dr. Henry's authorization to treat, including authorization to perform the fusion.

Dr. Henry performed a posterior instrumented fusion at L4-5 on May 6, 2016. It appears Claimant tolerated the procedure without complication. Following another course of post-operative management, Dr. Henry declared Claimant at maximum medical improvement on October 4, 2016. Dr. Henry ordered an FCE, but recommended another physician rate Claimant's impairment and provide an opinion on restrictions. Dr. Henry imposed temporary work restrictions until the evaluation occurred. Dr. Henry did not see Claimant after October 4, 2016. Dr. Henry acknowledged he previously thought Claimant's condition was unrelated to the work-related accident of July 3, 2014, but he deferred to the physician who found a causal relationship with whom ALJ Klein agreed. Dr. Henry believed the need for the fusion surgery resulted from instability caused by the initial surgery. Dr. Henry admitted he was not familiar with the equipment Claimant used to move trailers.

Upon being released from treatment by Dr. Henry, it appears Claimant was evaluated by Dr. Gadalla for an impairment rating and restrictions, but those records are

not in evidence. Apparently, Claimant was placed on permanent work restrictions and could not return to his usual work. Respondent did not offer Claimant his old job. Respondent offered Claimant an accommodated position as part-time security guard in Respondent's Oklahoma City, Oklahoma location. Claimant declined the job offer and resigned.

Claimant is not currently working. Claimant applied for work one or two times. Claimant applied for unemployment compensation but the application was denied because he had no wages for the twenty-six week period preceding his application. Claimant applied for Social Security Disability. Claimant does not see a health care provider for his back, and takes over-the-counter Tylenol PM to help sleep. Claimant wakes with a stiff back, and occasionally experiences right-sided thigh numbness and left foot numbness when he walks a lot. Claimant does some sanding and furniture refinishing and grows flowers at home. Claimant denied performing other yard work.

Dr. Murati evaluated Claimant again on February 20, 2017. Claimant reported low back pain radiating down the left buttock to the foot, and numbness of the left foot when walking long distances. Dr. Murati reviewed Claimant's course of medical treatment and evaluations. Examination was notable for depressed right ankle jerk and decreased sensation on the left side of the L5 nerve distribution. Dr. Murati acknowledged Claimant's spondylolisthesis preexisted the work-related accident and could have been asymptomatic, but the work-related accident caused a disc bulge, which produced the stenosis and new symptoms necessitating the surgeries. Dr. Murati recommended future medical treatment, including annual follow-ups with a physician and pain management. Under the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition, Dr. Murati believed Claimant was in DRE Category IV on account of the fusion and his functional impairment was 20% of the body as a whole. Dr. Murati imposed restrictions of no standing more than four hours per day, with thirty-minute breaks every hour. Dr. Murati believed Claimant was realistically unemployable. Based on Mr. Hardin's task list, Dr. Murati believed Claimant sustained a 100% task loss, and based on Mr. Benjamin's task list, Dr. Murati believed Claimant sustained a 71% task loss.

Mr. Hardin performed a vocational assessment of Claimant via telephone on April 25, 2017. Mr. Hardin completed an intake form with Claimant and reviewed Claimant's job tasks. Mr. Hardin completed a task list based on his interview of Claimant. Mr. Hardin also reviewed reports of Dr. Henry dated November 18, 2015, Dr. Gadalla dated October 25, 2016, and Dr. Murati. Based on Claimant's age, work experience and Dr. Murati's restrictions, Mr. Hardin did not believe Claimant was capable of gaining and holding substantial and gainful employment, and was realistically unemployable. Mr. Hardin conceded the FCE could clear Claimant to perform lifting up to 100 pounds, but the FCE would need to be adopted by a physician to constitute a medical restriction for vocational evaluation purposes.

Mr. Benjamin performed an in-person assessment of Claimant on November 20, 2017. Mr. Benjamin reviewed Claimant's education and employment status. Mr. Benjamin noted Claimant applied for work with two other employers after his employment with Respondent ended, and noted Claimant was receiving Social Security Disability benefits. Mr. Benjamin also reviewed temporary work restrictions imposed by Dr. Henry, until Claimant underwent a rating examination by another physician, the FCE report and Dr. Murati's restrictions. Mr. Benjamin testified under Dr. Murati's restrictions, Claimant was unable to re-enter the open labor market. Mr. Benjamin thought Claimant could re-enter the open labor market as a truck driver, based on Dr. Henry's restrictions and the FCE, and earn \$845.20 per week. Dr. Bailey's restrictions were reviewed with Mr. Benjamin, who thought Claimant could perform work as a "no-touch" driver.

Dr. Bailey performed a records review on January 12, 2018. Dr. Bailey reviewed medical records of Dr. Henry and the vocational report of Mr. Benjamin. Dr. Bailey also testified on May 22, 2018, and confirmed he did not see Claimant after the third fusion surgery. Dr. Bailey reiterated his belief the work-related accident was not the prevailing factor causing Claimant's medical condition requiring the surgeries or resulting impairment. Dr. Bailey believed Claimant sustained a sprain/strain of the lumbar spine on July 3, 2014. Dr. Bailey did not believe Claimant required permanent restrictions due to the soft tissue injuries he sustained at work on July 3, 2014, and Dr. Bailey did not believe Claimant sustained permanent disability on account of work-related injuries sustained on July 3, 2014. Dr. Bailey did not comment on future medical needs.

In his Award, ALJ Klein found Claimant suffered 20% functional impairment to the body as a whole as a result of his work injury based on the *AMA Guides*, after implicitly finding Claimant sustained a compensable injury to the low back. ALJ Klein also concluded Claimant met his burden of proving he would need future medical treatment. ALJ Klein also concluded Claimant was permanently and totally disabled as a result of his injury. Claimant's counsel was awarded an attorney's fee, although a copy of the written fee agreement was not filed with the Division. Respondent appealed.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues Claimant's injury is not compensable, but the result of a preexisting medical condition. Respondent also contends Claimant is not permanently and totally disabled, and is not entitled to an award of future medical treatment. Claimant contends he met his burden of proving the work-related accident was the prevailing factor causing his injury, medical condition, and resulting permanent total disability. Claimant also argues the award of future medical treatment should be affirmed.

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions

of the Act.¹ The provisions of the Workers Compensation Act shall be applied impartially to all parties.² The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.³

1. Claimant met his burden of proving the work accident was the prevailing factor causing his low-back injuries, need for medical treatment and resulting disability.

Respondent contends the ALJ Klein erred in implicitly finding Claimant sustained a compensable low-back injury, particularly a herniated disc at L4-5 requiring three surgeries. To be compensable, an accident must be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift.⁴ The accident must be the prevailing factor in causing the injury, and “prevailing factor” is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.⁵ An accidental injury is not compensable if work is a triggering factor or if the injury solely aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.⁶ Furthermore, the accidental injury arises out of employment only if there is a causal connection between work and the accident, and if the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.⁷ An injury that occurs as a result of the natural aging process is not considered to arise out of and in the course of employment.⁸

After considering the relevant evidence in the record, the Board concludes Claimant met his burden of proving he sustained an injury to the low back, in particular the herniated disc at L4-5 requiring three surgeries, from an accident arising out of and in the course of his employment with Respondent on July 3, 2014. First, Claimant’s testimony regarding the event of July 3, 2014, is uncontested, and Claimant’s reported histories to the multiple

¹ See K.S.A. 44-501b(a).

² See *id.*

³ See K.S.A. 44-501b(c).

⁴ See K.S.A. 44-508(d).

⁵ See K.S.A. 44-508(d),(g).

⁶ See K.S.A. 44-508(f)(2).

⁷ See K.S.A. 44-508(f)(2)(B).

⁸ See K.S.A. 44-508(f)(3)(A).

treating and examining physicians are consistent. The event of July 3, 2014, described by Claimant, occurred.

Second, the greater weight of the credible evidence supports finding the July 3 accident was the prevailing factor causing the herniated disc at L4-5 and need for treatment. Claimant worked without problem or accommodation before July 3, 2014, and felt an immediate onset of symptoms consistent with a disc herniation at L4-5. Dr. Henry initially stated the accident of July 3 was not the prevailing factor causing the injury or need for surgery, but he later testified he changed his mind and would defer to the Court-ordered physician. Dr. Bailey, Respondent's evaluating physician, was provided limited medical records and thought Claimant only sustained a work-related strain/sprain from the work-related accident and the balance of Claimant's conditions were personal, degenerative conditions. Dr. Murati, Claimant's evaluating physician, opined Claimant's stenosis, which required the surgeries, was work-related. Dr. Prostic, the Court-appointed neutral physician, opined Claimant sustained an annular tear at L5-S1 causing the stenosis and radiculopathy. While Dr. Prostic's diagnosis differs from the diagnosis made by Dr. Henry, the true cause of Claimant's symptoms and need for medical treatment was the stenosis, which Dr. Prostic believed was caused by the work-related accident. Claimant's description of the onset of symptoms, which was uncontested, supports Dr. Prostic's causation opinion. The Board finds the greater weight of the evidence as a whole proves Claimant sustained a change in the physical condition of the L4-5 disc due to the July 3, 2014, accident, which caused the stenosis producing Claimant's symptoms and ensuing course of surgeries. Claimant met his burden of proving compensability.

2. Claimant is permanently and totally disabled on account of the compensable work-related injuries he suffered on July 3, 2014.

The Board next considers the issue of nature and extent. Respondent contends ALJ Klein erred in finding Claimant was permanently and totally disabled, and Claimant argues ALJ Klein's conclusion was correct.

The Board agrees with ALJ Klein's initial conclusion Claimant sustained 20% functional impairment to the body as a whole on account of the work-related low back injuries he sustained. Dr. Bailey's opinion Claimant sustained no permanent impairment, without explanation, is premised on Claimant only suffering a strain/sprain injury and does not consider the full extent of Claimant's compensable injuries. Moreover, Dr. Bailey did not see Claimant after the third fusion procedure. Dr. Henry did not provide an impairment rating, and Dr. Gadalla did not testify. Dr. Murati saw Claimant after the third surgery, took into consideration all of Claimant's compensable injuries and explained in his deposition how he arrived at 20% functional impairment under the *AMA Guides*. Dr. Prostic, the Court-ordered physician, did not provide an impairment rating. The Board concludes the opinions of Dr. Murati are the most credible of the testifying physicians on the extent of Claimant's functional impairment under the *AMA Guides*.

The primary issue, however, is whether Claimant is permanently and totally disabled. Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment, and expert evidence shall be required to prove permanent total disability.⁹ Concluding an employee is permanently and totally disabled because the employee is essentially and realistically unemployable is consistent with legislative intent.¹⁰

In *Wardlow*, the Court of Appeals affirmed a finding of permanent total disability by the trial court based on a totality of the evidence, including consideration of the nature of the injuries, the testifying physicians' opinions on the employee's ability to work, the activities the employee can perform, the employee's age, education, vocational history and current symptoms.¹¹ *Wardlow* continues to be cited favorably by the Court of Appeals in "New Act" cases.¹²

In this case, a greater weight of the evidence contained in the record supports ALJ Klein's conclusion Claimant was permanently and totally disabled. Dr. Henry and Dr. Prostic did not comment on Claimant's ability to work or impose permanent work restrictions. Dr. Gadalla did not testify. The FCE report was not adopted by any of the testifying physicians. Dr. Murati believed Claimant was unemployable, primarily due to the restriction of working more than four hours per day. Dr. Bailey did not believe Claimant required permanent restrictions for a work-related strain/sprain, but did not see Claimant after the third surgery or otherwise comment on Claimant's ability to work. Based on this record, the more credible medical opinion on Claimant's ability to work is Dr. Murati's opinion because he evaluated Claimant after he underwent all three surgeries. Both Mr. Hardin and Mr. Benjamin testified, from a vocational standpoint, Claimant was realistically unemployable based on Dr. Murati's restrictions. Moreover, Claimant was 56 years old at regular hearing, with a high school diploma. Claimant's vocational history for the past eleven years is truck driving work he is no longer physically capable of performing. Respondent was unwilling to have Claimant return to work as a truck driver, and offered a part-time job in another state, which does not constitute substantial and gainful employment. Claimant's low back remains symptomatic and Claimant experiences intermittent lower extremity numbness. Based on a totality of the evidence and consideration of the expert testimony of Dr. Murati and the vocational experts, Claimant is permanently and totally disabled from engaging in any substantial and gainful employment. Accordingly, the award of permanent and total disability compensation should be affirmed.

⁹ See K.S.A. 44-510c(a)(2).

¹⁰ See *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

¹¹ See *id.* at 114-15.

¹² See *Stark v. Atwood Good Samaritan Center*, No. 113,075, 2016 WL 4076203, at *7 (Kansas Court of Appeals unpublished opinion July 29, 2016).

3. Claimant met his burden of proving he is entitled to an award of future medical treatment.

Finally, the Board addresses whether ALJ Klein's award of future medical treatment should be affirmed. The employer's liability to pay compensation attaches when an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment.¹³ The employer's liability for compensation includes the duty to provide medical treatment as may be reasonably necessary to cure or to relieve the effects of the injury.¹⁴ An injury arises out of employment only if the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.¹⁵ It is presumed the employer's obligation to provide medical treatment terminates upon the employee's reaching maximum medical improvement. The presumption may be overcome with medical evidence it is more probably true than not additional medical treatment will be necessary after maximum medical improvement. "Medical treatment" means treatment provided or prescribed by a licensed health care provider and not home exercises or over-the-counter medication.¹⁶

Claimant underwent three surgeries culminating in a posterior instrumented fusion at L4-5 with pedicle screws and rods. Claimant remains symptomatic. Dr. Henry did not testify to Claimant's future medical needs. Dr. Prostic did not comment on future medical, and Dr. Gadalla did not testify. Dr. Murati believed Claimant would require annual physician follow-ups and possible pain management modalities. Dr. Bailey did not believe Claimant required any medical treatment for his strain/sprain. Dr. Murati's opinions on future medical are the most credible of the testifying physicians because he had a more accurate understanding of the extent of Claimant's compensable injuries and he saw Claimant after all three surgeries. The Board concludes Claimant met his burden of presenting medical evidence proving it is more probably true than not additional medical treatment will be necessary after maximum medical improvement. Therefore, the award of future medical treatment should be affirmed.

CONCLUSION

Claimant met his burden of proving by a greater weight of the credible evidence he sustained injuries to his low back, particularly a disc herniation at L4-5 necessitating three surgeries, from an accident arising out of and in the course of his employment with Respondent on July 3, 2014. Claimant also met his burden of proving he was rendered

¹³ See K.S.A. 44-501b(b).

¹⁴ See K.S.A. 44-510h(a).

¹⁵ See K.S.A. 44-508(f)(2)(B)(ii).

¹⁶ See K.S.A. 44-510h(e).

permanently and totally disabled due to the work-related injuries. The award of future medical treatment is supported by the greater weight of the credible evidence and should be affirmed. Finally, the written fee agreement between Claimant and his attorney complies with K.S.A. 44-536 and is approved.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board the Award issued by ALJ Thomas Klein, dated December 3, 2019, is affirmed.

Furthermore, Claimant's counsel's fee agreement complies with K.S.A. 44-536 and is approved. Claimant's counsel is awarded an attorney's fee of 25% of the temporary and permanent disability benefits awarded and reimbursement for actual litigation expenses incurred, to be paid from the compensation awarded herein.

IT IS SO ORDERED.

Dated this 24th day of July 2020.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: (Via OSCAR)
Patrick J. Mitchell
William L. Townsley, III
Hon. Thomas Klein